



JUSTUS MAKORI OMINDE APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate’s Court at Keroka, Hon. A. P Ndege in Keroka SRMCR Case No. 775 of 2009 dated 16th day of February, 2010)

The appellant **Justus Makori Ominde** was charged with the offence of defilement contrary to section 8(i) as read with section 8(3) of the **Sexual Offences Act, 2006**. He is said to have committed the offence on the 8th day of July, 2009 at {*particulars withheld*} in Masaba District, within Nyanza Province. He denied the charge and was subsequently tried, convicted and sentenced to serve 20 years imprisonment. He has now appealed to this court against both convictions and sentence.

The brief facts of the case are that the victim of the offence, one **V. K** a child for 15 years, left her home on the 8th July, 2009 and went to the accused house where they had sexual intercourse. She testified as PW1 and told the court that on the material night, the accused visited her home where they secretly agreed that she goes to his house that night. She duly obliged and sneaked out of her home, to the accused’s home and had sexual intercourse that night. In her words she stated:-

“At around 9.00 to 10.00p.m I got out because of the thoughts in my mind and I went to accused’s home we slept together. We had sexual intercourse with him. “Aliniingilia tukafanya mapenzi tukakutana kimwili...”.

She further testified that the accused was her boyfriend whom she had known for about six years though she could not remember when they started having sex. The victim’s mother testified as PW2 and told the court that when she found her daughter missing from the house at night, she went to the police at Ibacho where a police officer accompanied her to the accused’s house where they found the accused and the victim. Both were arrested and taken to Ibacho Police Station where they were put in the cells. The following morning they were taken to Keroka District Hospital for medical examination.

No. 89217 **PC Joel Maantu**, the arresting officer testified as PW3 and informed the court that he arrested both the accused and the victim, booked them in at the station and the next day took them to Keroka District Hospital for examination. He issued a P3 form to the victim. PW4 **Joel Ongaro** a clinical officer based at Masaba District Hospital testified that he examined PW1 on 9th July, 2009 and that upon examination he formed the opinion that there was recent penetration. Further examination also revealed that the patient was HIV positive. He produced the P3 form.

The appellant gave an unsworn statement in which he stated that he was not in his house on the material night having gone to visit a traditional herbalist and spent the night there. He said that he was arrested the

following day while on his way to Kisii District Hospital. After evaluating the evidence the trial court was satisfied that the alibi proffered by the accused was displaced. It convicted and sentenced the appellant as aforesaid.

In his home made petition and written submissions the appellant has complained that:

- i. *The trial court did not properly consider the medical report in respect of the complainant in his favour as the report had indicated that the absence of spermatozoa.*
- ii. *That the complainant had been tested HIV positive while he the accused was HIV negative and that the court ignored his plea that he be tested for HIV and a report produced in court.*
- iii. *That the evidence of PW1, PW2 and PW3 was contradictory and*
- iv. *That the age of the complainant was not determined conclusively.*
- v. *That the court refused to consider his alibi.*
- vi. *That the sentence is excessive.*

Mr. Mutai, counsel for the respondent conceded the appeal on the grounds that the conviction was not safe. He submitted that the age of the complainant was not established beyond reasonable doubt. The complainant had stated that her age was 16 and that they had known each other with the accused for about 6 years. The birth certificate produced by her mother put her age lower than 16 meaning that the offence was committed when the complainant was 13 years and 11 months and further that going by the complainant's testimony of having known the appellant for six years then their affair would have started when she was 7 years old. **Mr. Mutai** submitted that the discrepancy in age was material and showed that the prosecution did not prove its case beyond reasonable doubt.

As a first appellate court it is my duty to subject the evidence tendered before the lower court to a fresh evaluation. See **Okeno –vs- Republic (1972) E. A 32**.

The appellant has discounted the medical report in respect of the complainant stating that he was wrongly convicted as the report did conclusively state that there was sexual intercourse. My perusal of the P3 form as well as the testimony of PW4 however discounts that submission. The P3 form states "*There was penetration and ejaculation*".

The second ground set out by the appellant is that the testimony of PW1, PW2 and PW3 was contradictory. It is not elaborated in what respect. The other ground is that the trial court refused to believe the alibi of the appellant. My evaluation of the evidence however shows that the alleged alibi was completely displaced by the evidence of PW1, PW2 and PW3 consistently point to the presence of the appellant in his house on the material night from where he was arrested. PW1 the victim, narrated how she left her home and went to the appellant's home subsequent to her being seduced earlier on at her home by the appellant. The testimony of the mother PW2 is that the two were arrested in the appellant's house.

The appellant has also taken issue with the fact that a medical report was not produced in court to demonstrate that he was HIV negative as he had requested the trial court. It is true that such a report was not produced. However, I see no prejudice suffered by the appellant as a result of that. The HIV status of either the complainant or the appellant or both of them was immaterial to the case. The investigation and the charge before the trial court was one of defilement and the same was capable of being proved without an HIV status report.

I find from my analysis of the evidence tendered in the lower court that indeed the appellant had sexual intercourse with the complainant. This is apparent from the ready admission of the complainant and the medical evidence produced by PW4.

The state conceded the appeal on the ground that the conviction was not safe as the age of the complainant was not conclusively determined by the court. This is the final issue for my determination.

The complainant gave her age as 16 years. In her testimony her mother produced a birth certificate issued on 17th September, 2009 which showed that the complainant was born on 8th August, 1995 thereby placing her age at 14 at the time of the commission of the offence. The court should have conclusively decided the complainant's age. It did not. It just noted that the birth certificate was issued on 17th September, 2009 (2 months after the charge).

I am constrained to agree with the learned counsel that the omission was material. The **Sexual Offences Act** makes the age of the complainant or victim a critical determinant in sentencing. In this particular case, the court sentenced the appellant under Section 8 (3). That was arbitrary as the court had not come to a conclusion on the age of the complainant. Indeed the omission was not only prejudicial to the appellant, but dealt a fatal blow to the prosecution case.

For this reason alone, the appeal must succeed. In the result, I set aside the conviction and quash the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 25th day of September 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Justus Makori Omindi : Appellant (present/absent)

..... : Counsel for the respondent (present/absent)

..... : Court clerk

R. LAGAT-KORIR
JUDGE